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No. 77-1176

In the Supreme Court of the United States

OCTOBER TERM, 1977

NABISCO, INC. and PEPSI-COLA GENERAL BOTTLERS, INC.,
Appellants,

v.

BERNARD KORZEN, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellants Nabisco, Inc. and Pepsi-Cola General Bottlers, Inc. submit this brief in support of their appeal and in opposition to the Motion of defendants-appellees to dismiss or affirm.

Defendants do not dispute the basic points that underlie the appeal: (1) Northwestern's charter exemption is a binding contract protected against impairment by the United States Constitution; (2) the purpose of the charter's tax exemption provision was to subsidize the University's educational program; (3) that purpose has been held for

more than a century to preclude the collection of real estate taxes with respect to property owned by Northwestern and leased to business firms for commercial uses; and (4) the burden of the leasehold taxes at issue here will ultimately fall upon Northwestern (in the amount of approximately $1,000,000 per year) and will substantially deprive Northwestern of the subsidy benefits it obtains from its charter tax exemption.

Defendants' entire argument is that they have succeeded in evading the constitutional requirements and imposing the burden of real estate taxes on Northwestern because of the technique of assessing the tax against Northwestern's lessees. It is appellants' position that the constitutional requirements may not be avoided by a change in labels. It is this important issue which underlies the appeal. Nothing in defendants' Motion to Dismiss or Affirm detracts from the sharpness or importance of that question.

In this brief we reply to three matters suggested by defendants, apparently in an effort to minimize the novelty and importance of the basic issues.

ARGUMENT

First, defendants claim that the brief filed by Northwestern University as *amicus curiae* indicates that Northwestern does not view the tax as an impairment of its charter but only contends "that the leaseholds in question have been erroneously and excessively assessed." (Defts' Motion 2).

This argument is a clear misconstruction of Northwestern's *amicus* brief. That brief does not argue that the leasehold interests have been "excessively assessed." Northwestern contends that the leaseholds have not been assessed at all. Instead, defendants have assessed Northwestern's fee interest in the property and then sent the tax bills to the lessees—ultimately, to be paid by Northwestern in the form of rent reductions—a process which deprives Northwestern of the benefit of its charter tax exemption and impairs its constitutional rights. As Northwestern itself stated:

> "What is at issue in this case is not the proper valuation methods for taxing a leasehold estate. What is at issue here is the imposition of the leasehold tax which, under the facts of this case, will deprive Northwestern of the benefits of its Charter contract." (Northwestern Br. 9).

After noting that the present "so-called leasehold taxes" would if sustained deprive the University of $1,000,000 per year, Northwestern stated:

> "Because the State may not tax Northwestern on property it owns, the issue is whether the State may tax Northwestern's lessees on what Northwestern owns —if the inevitable result is exactly the same as if Northwestern's property were taxed.
>
> ". . . The effect . . . would be to place the tax burden on Northwestern because of property it owns.

> "If this consequence were permitted, then the Charter exemption would be rendered a nullity with respect to properties leased by the University to provide revenues for education; and the Legislature's purpose in creating the Charter exemption and making it applicable to properties leased to provide educational revenues, which this Court has recognized and enforced, would be completely undermined." (Northwestern Br. 13-14).

Second, defendants argue that the leasehold taxes have been routinely assessed against Northwestern lessees for many years under an 1853 statute—thus suggesting that the issues in the present appeal are neither novel nor important. (Defts' Motion 3-4). These contentions are incorrect. While the defendants attempt to create a *dehors* the record illusion that Northwestern lessees have paid leasehold taxes assessed over the last 125 years since the grant of the Northwestern charter exemption (see Defts' Motion 3), the record as made by the complaints of Nabisco and Pepsi-Cola establishes that such taxes were *not* assessed to, or paid by, Northwestern's lessees during this period.[1] The majority opinion of the Supreme Court of Illinois did not rely upon any such past practice of taxation of Northwestern lessees. The dissenting judges specifically cited the *absence* of any prior taxation of Northwestern's lessees as an argument against the construction of the leasehold tax statute adopted by the majority. The dissenters stated:

> "... [T]he existence for more than a century of statutory provisions similar to section 26 (1853 Ill. Laws 39, sec. 5) without their application in the manner now attempted would seem to be some indication of the opinion of taxing authorities regarding their applicability to Northwestern's lessees." (App. 18).

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[1] In fact, during 1964, defendants attempted unsuccessfully to assess Nabisco's leaseholds under Section 26. Northwestern objected to the assessments as impairments of its Charter, and the leaseholds were held exempt from taxation by the Board of Appeals of Cook County and by the Illinois Department of Revenue. (NR. C59-60).

Furthermore, if the taxing authorities had thought that they could tax the leased real estate by means of the leasehold tax, they would not have engaged in their repeated unsuccessful attempts to tax Northwestern directly in the century between *University* v. *People ex rel. Miller*, 99 U.S. 309 (1878), and *People ex rel. County Collector of Cook County* v. *Northwestern Univ.*, 51 Ill.2d 131, 281 N.E.2d 334, *cert. denied*, 409 U.S. 852 (1972). And if these taxes were well established, Northwestern University would not file a brief with this Court arguing that their application will cost the University $1,000,000 per year. (Northwestern Br. 8).

Third, defendants contend that this Court has answered the questions presented by this appeal in *Jetton* v. *University of the South*, 208 U.S. 489 (1908), and that the later *Central of Georgia* cases, in which this Court declined to follow its earlier decision in *Jetton*, are inapposite because in those cases the lessee used the leaseholds for the same railroad purposes for which the lessor's exemption had been granted. However, a fair reading of the *Central of Georgia* cases shows that those decisions did not turn on the nature of the lessee's business. Instead, the leasehold taxes in the *Central of Georgia* cases were voided because "the protection of the lessee [was] necessary in order to make good that promised to the lessor." 236 U.S. 674, 680 (1915).

Moreover, defendants' argument ignores the fact that Nabisco's and Pepsi-Cola's leaseholds *are* used to subsidize and further the educational purposes for which Northwestern's charter exemption was created. As this Court stated in the first Northwestern charter case, *University* v. *People ex rel. Miller*, 99 U.S. 309, 324 (1878), property leased by Northwestern to raise revenues for its educational services "is held for school purposes, in the fullest and clearest sense." *Jetton* did not involve a subsidy exemption such as Northwestern's, but rather an exemption designed to maintain a buffer zone around a campus to protect against undesirable elements adjacent

to the school, and the taxes imposed in *Jetton* did not affect or interfere with that purpose. The taxes at issue in the *Central of Georgia* cases, like those involved on this appeal, violated the purpose for the exemption, which was to subsidize the lessor's operations. For that reason, the *Central of Georgia* cases, rather than *Jetton*, are controlling of the constitutional issues in this case.

CONCLUSION

Defendants' Motion does not detract from the existence or importance of the constitutional issues raised in the Jurisdictional Statement. The Court should note probable jurisdiction of this appeal and, upon plenary consideration of the appeal, reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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